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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 702

W. C. PHILLIPS and FRED J. DAY, JR., Trustees,
Petitioners,
v.
GEORGE WALTER BAKER and MODERN PRECOOLING COMPANY, a partnership,
Respondents.

Petition for Review on Writ of Certiorari

To the United States Circuit Court of Appeals
For the Ninth Circuit

and

Brief in Support

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Petition for Review on Writ of Certiorari

To the United States Circuit Court of Appeals
For the Ninth Circuit

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This petition of W. C. Phillips and Fred J. Day, Jr., Trustees, respectfully prays that, in accordance with the provisions of the United States Code, Title 28, Section 347(a), the United States Circuit Court of Appeals for the Ninth Circuit be required by writ

of certiorari issued by the Supreme Court of the United States, to certify to it for determination, the above identified case in which the decision of the said circuit court of appeals was rendered on July 18, 1941.

SUMMARY STATEMENT OF MATTER INVOLVED

Interpretation of Federal Rules of Civil Procedure, Rule 12.

The first question which petitioners ask to have reviewed and determined by this Court is whether the Federal Rules of Civil Procedure, Rule 12(h) (United States Code, Title 28, following Section 723c), forbids a defendant to raise in his answer, defenses which could have been raised and decided concurrently with other matters raised by motion.

This suit was commenced by petitioners, by the filing in the United States District Court for the Northern District of California, Northern Division, of a Complaint (Transcript; pages 1-3) charging infringement of Letters Patent of the United States. The defendants' first step was the filing of a Motion under the Federal Rules of Civil Procedure, Rule 12(e), for a more definite statement as to the apparatus the use of which was charged to constitute infringement, and as to the claims which were charged to be infringed. *No more definite statement with respect to the allegations establishing venue was asked for by this Motion.* Defendants thereafter filed an Answer (Transcript; page 4) in which they raised a defense of improper venue by denying the allegations of paragraphs II,

III, and IV of the Complaint. This was met by petitioner's contention that after bringing a Motion under Rule 12(e), without concurrently interposing the defense of improper venue as permitted by Rule 12(g), the defendants were forbidden to raise the defense of improper venue by the terms of Rule 12(h), reading as follows:

> "*Rule 12(h)* WAIVER OF DEFENSES
>
> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

The District Court, and the Circuit Court of Appeals, in an opinion (Transcript; pages 20-30) and also reported at 121 Fed. (2d) 752, held that Rule 12(h) should be interpreted, contrary to its plain language, so as to permit the defendants under these circumstances to raise the defense of improper venue in their answer.

Interpretation of United States Code, Title 28, Section 109.

The second question which petitioners ask to have reviewed and determined by this Court (in the event of an affirmance of the decision of the Circuit Court of Appeals on the first point), is whether the statute relating to the venue of actions arising under the patent laws of the United States (United States Code, Title 28, Section 109) should be so restrictively interpreted as to wholly exempt proprietors of businesses of an essentially transient character from suit except in the district of which they are inhabitants. This involves an interpretation, with respect to businesses of such an essentially transient character, of the scope and meaning of the phrase:

"regular and established place of business"

as it is used in the aforesaid statute, and no such interpretation has been made by any decision of this Court.

The Answer (Transcript; page 4) filed by respondents raised a defense of improper venue by denying that defendants had a regular and established place of business within the District in which suit was commenced; that they had committed the acts of infringement complained of within said District; and that they were inhabitants of said District.

The parties thereupon submitted the issue as to venue to the District Court for preliminary determination in accordance with the practice permitted by the Federal Rules of Civil Procedure, (Rule 12(d)), presenting the issue as to the proper interpretation of the scope and meaning of the phrase:

"regular and established place of business"

in the statute above identified, by stipulating (Transcript; pages 5-9) that respondents were not inhabitants of the District in which the suit was commenced, but that they had committed the acts charged to constitute infringement within the said District and that respondents' business was carried on in a manner described in detail in an Agreed Statement of Facts (Transcript; pages 6-9).

It was shown by this Agreed Statement of Facts that the Letters Patent of the United States upon which petitioners rely relates to improvements in portable "precooling" apparatus, used in cooling agricultural produce in refrigerator cars after they have been loaded and before they have been removed from the packing shed where they have been loaded; that there are a large number of widely separated agricultural districts in the United States in each of which "precooling" service, involving the use of apparatus of the character to which the patents in suit relate is required by shippers during only a few weeks of the year; that the respondents travel from one agricultural district to another each season furnishing complete "precooling" service to such shippers, securing business en route by personal solicitation of shippers at the premises of each shipper; and that the respondents convey their portable "precooling" apparatus from job to job in trucks owned by themselves, transacting en route all necessary business in connection with their operations. It was also shown by the agreed statement of facts that at the date of the commencement of the present suit, respondents were engaged in

"precooling" operations as above described, in the District in which suit was commenced and that the individual respondent George Walter Baker was personally served with the summons and complaint.

On this record the District Court held, in an Order (Transcript; pages 9-10) that neither of the respondents had a "regular and established place of business" within the District in which suit was commenced, and entered a Judgment of Dismissal (Transcript; pages 10-11) without prejudice.

This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, on the same ground, in an Opinion (Transcript; pages 20-30) officially reported at 121 Fed. (2d) 752; and its Decree (Transcript; page 31) was duly entered.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Interpretation of Federal Rules of Civil Procedure, Rule 12.

This case presents a question of general importance relating to the interpretation of the Federal Rules of Civil Procedure, which affects all litigation under these rules, and which has not been, but should be, settled by this Court.

The Circuit Court of Appeals for the Ninth Circuit has by interpretation, read into Rule 12(h) an exception in favor of defendants which is nowhere warranted by the plain language of this section of the rule. In doing so it has supererogated the function of

the Supreme Court of the United States which promulgated and which alone has power to amend the Federal Rules of Civil Procedure. If amendment by interpretation is to be permitted, adjudications effecting such amendment should, at the least, be specifically reviewed and approved by the Supreme Court of the United States.

Interpretation of United States Code, Title 28, Section 109.

The case also presents a question of general importance relating to the interpretation of the Federal statute defining proper venue in patent cases, which has not been, but should be, settled by this Court.

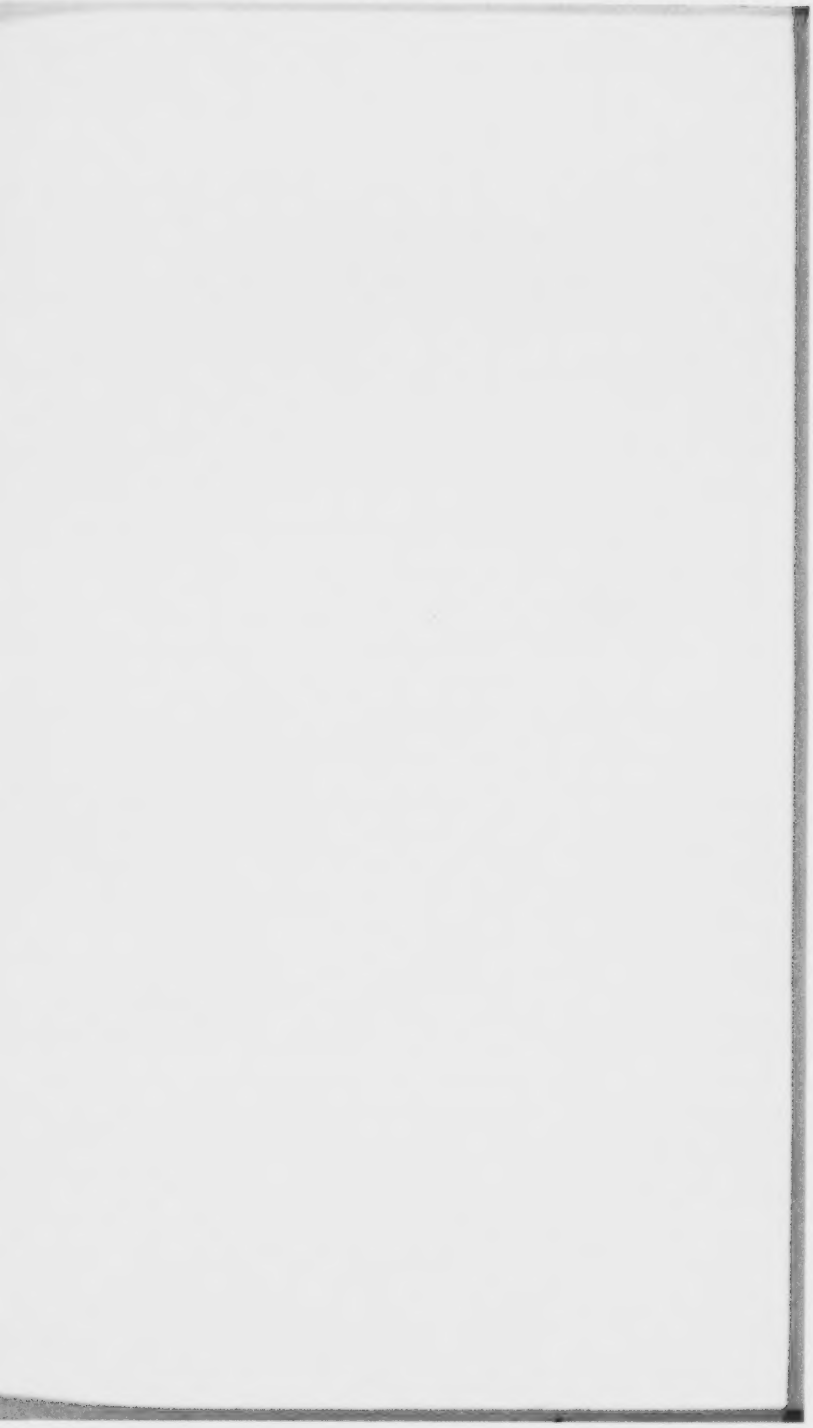
A review of the decision of the Circuit Court of Appeals for the Ninth Circuit is essential to prevent establishment as a precedent of its interpretation, under which an obvious means whereby infringers may completely evade the jurisdiction of the United States courts in many patent cases, and place great and unwarranted burdens upon patent owners in all patent cases, is given judicial sanction.

The Circuit Court of Appeals for the Ninth Circuit has decided the question presented by this case in a way which is submitted to be in conflict with the principles enunciated in relevant decisions of this Court, in holding that Section 48 of the Judicial Code (U.S.C. Title 28, Section 109) sets up *jurisdictional* requirements, whereas according to the decision of this Court in *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, this section relates only to *venue*.

The Circuit Court of Appeals for the Ninth Circuit has, in its own opinion in this case, expressed doubt as to the scope of the jurisdiction of the District Court under an agreed state of the facts and should properly have certified the case to the Supreme Court of the United States for instructions as to the law relating thereto.

WHEREFORE YOUR PETITIONERS RESPECTFULLY PRAY that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the United States District Court for the Northern District of California, Northern Division be reversed by this Honorable Court, and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

THEODORE H. LASSAGNE,
JAMES M. NAYLOR,
Counsel for Petitioners.



Brief in Support of Accompanying Petition for Certiorari

THE OPINION BELOW

No opinion was rendered by the District Court. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (by Garrecht, C.J.) is reported at 121 Fed. (2d) 752, and appears in the Transcript, pages 20 to 30.

THE JURISDICTION

The judgment, a review of which is sought, was rendered July 18, 1941. The authority of this Court is invoked under the provisions of the United States Code, Title 28, Section 347(a) and of Rule 38 of this Court.

The judicial discretion of this Court is invoked because of the general importance of the two questions presented by the present case. The interpretation of fundamental aspects of the provisions of the Federal Rules of Civil Procedure is of particular importance during the present formative stage of practice under those rules, and it is urged that such interpretation should be accepted as a responsibility of the court which promulgated them. The interpretation of Section 48 of the Judicial Code (U.S.C. Title 28, Section 109), because of its general importance in all patent litigation, has frequently been undertaken in cases where there was no conflict between decisions of cir-

cuit courts of appeals. *W. S. Tyler Co. v. Ludlow-Saylor Wire Company,* 236 U.S. 723; *Leman v. Krentler-Arnold Co.,* 284 U.S. 448; *General Electric Company v. Marvel Rare Metals Company,* 287 U.S. 430.

STATEMENT OF THE CASE AND SPECIFICATION OF ERRORS

The general facts are sufficiently stated in the Summary Statement of Matter Involved contained in the foregoing petition.

The errors relied upon as ground for review and reversal of the decision of the court below, are as follows:

1. The court below erred in holding that the defendants, by filing a motion for a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, which motion sought no statement relevant to any question of venue, and by omitting to concurrently interpose a defense of improper venue, did not waive the right to assert the defense of improper venue in the answer.

2. The court below erred in holding that at the time of the commencement of the present action neither of the defendants had a regular and established place of business within the Northern District of California.

ARGUMENT

The interpretation of subdivision (h) of Rule 12 of the Federal Rules of Civil Procedure sought by this petition is regarded as of fundamental importance for the reason that the interpretation adopted by the Circuit Court of Appeals nullifies the primary object of the Rules by making possible delays prior to the trial at least as great as any possible under the obsoleted Federal Equity Rules. In order to demonstrate the fundamental character of the issue presented, it is necessary to point out the delays made possible by the interpretation adopted by the Circuit Court of Appeals and to compare the established practice under the old Federal Equity Rules.

With reference to subdivision (h), the opinion of the Circuit Court of Appeals says:

> "Evidently, the paragraph was intended to provide that any defense permitted to be made by motion at the option of the defendant, and which is not raised *either* by motion *or* by the answer, will be deemed to have been waived."

The language of the subdivision in question is, in part however, as follows:

> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, *if he has made no motion,* in his answer or reply, * * *." (Emphasis added.)

The decision of the Circuit Court of Appeals *admittedly reads out of the rule entirely* the clause "if he

has made no motion", for they responded to petitioners' insistence that this clause be given effect by saying:

> "To follow appellant's argument would require that subdivision (h) be given a narrow, rigid, and illiberal construction which frequently would result in injustice and which in this case would deprive defendants of a valuable right."

It is submitted that this invective characterization of the interpretation for which petitioners contend is wholly without justification, and that the interpretation adopted by the Circuit Court of Appeals in contravention of the clear language of the Rule suborns delay equalling any possible under the Federal Equity Rules.

Under the Federal Equity Rules, a challenge to venue required a "special appearance" prior to any motion or pleading constituting a general appearance. After decision of jurisdictional questions, motions were permitted prior to answer. Thus there were three necessary hearings; one on jurisdiction, one on other motions, and one on the merits.

The Federal Rules of Civil Procedure abolished special appearances, and permitted jurisdictional questions to be raised with other motions, or if no other motions were made, in the answer. The obvious purpose of this change was to speed proceedings by reducing the number of hearings to one, or at most, two. This purpose is evident from the mandatory provision of Rule 1 of the new Rules, that:

> "They shall be construed to secure the just, *speedy,* and inexpensive determination of every action."

Under the Circuit Court of Appeals' interpretation of subdivision (h) of Rule 12, however, this purpose is disregarded. A defendant may defer the necessity for a prompt answer by raising by motion any number less than all of the six defenses set forth in subdivision (b) of Rule 12. Then the defendant may raise in his answer any of these six defenses not made the subject of his motions, *and by an application for preliminary hearing under subdivision (d) of Rule 12 obtain a second hearing equivalent to a motion hearing,* before final hearing on the merits. Thus three hearings are possible, just as before the new Rules' adoption.

Under the interpretation of subdivision (h) of Rule 12 for which petitioners contend, this would not be possible. If any motion were heard, no basis for an application for preliminary hearing under subdivision (d) of Rule 12 would be possible, except for judgment on the pleadings in special cases. There would be two hearings in each case instead of three, thus following the clear purpose of the Rules to expedite the determination of every action.

Vigilance in restraining judicial interpretation abortive of the objects of the new Rules is essential if they are to attain those objects. In the present case, no power but this Court can act to preserve the Rules which it has laid down, and it is submitted that certiorari should be granted for this purpose.

The interpretation of Section 48 of the Judicial Code (U.S.C. Title 28, Section 109) also presents a question of general importance in all patent cases, which has not been, but should be, settled by this Court.

No decision of this Court has interpreted this statute in its application to a business of a wholly transient nature, in which there is no necessity for the maintenance of a *permanent* place of business in any locality. The case most nearly in point (*W. S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U.S. 723) differed essentially from the present case in that this Court found that no infringement of the patent in suit had been committed within the District where suit was brought. In the present case, on the contrary, it has been stipulated that the acts charged to constitute infringement have been committed within the District where suit was brought.

Petitioners respectfully urge that should the decision of the Circuit Court of Appeals stand unreversed in this case they will be denied any effective remedy against itinerant infringers of the character of respondents herein. The opinion of the Circuit Court of Appeals has noted petitioners' contentions on this point (Transcript; page 29, last paragraph), and has attempted an answer thereto.

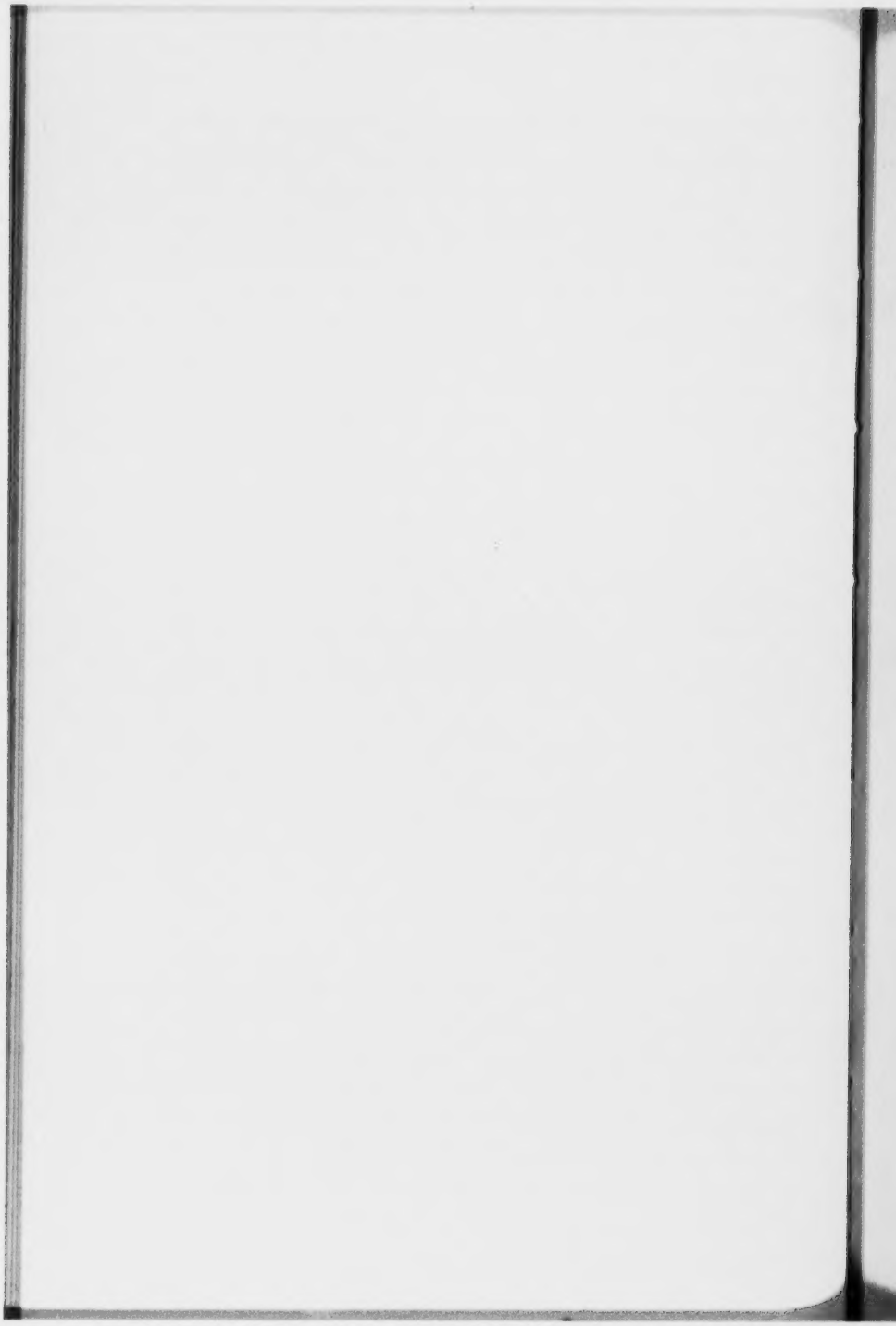
That answer is, upon consideration of the undisputed facts, no answer at all. It is based upon respondents' admission that they have a "regular and established place of business" in another District, and petitioners had no notice of that fact until June 13, 1940;

the date of the Stipulation herein (Transcript; pages 5-9). Obviously, such an admission, after joinder of issue by the filing of an Answer on March 1, 1940 (Transcript; page 4) could not have guided petitioners in selecting the District in which to institute suit. And furthermore, it is obvious that petitioners *cannot rely upon this admission in instituting a suit in the District in which respondents admit having had a regular and established place of business on June 13, 1940; for all that the petitioners have to do to avoid the jurisdiction is to abandon that place of business before the institution of suit.* The "regular and established place of business" must exist at the time suit is filed to support jurisdiction. *Underwood Typewriter Co. v. Fox Typewriter Co., Ltd., et al.*, 158 Fed. 476, 483. Thus, if defendants move often enough, plaintiffs in patent cases are remediless; or so the court below, in effect, has held.

While, in the present case, the necessity for deciding this question is contingent upon decision of the first question adversely to petitioners, the second question clearly is not limited in its importance to parties interested in the subject matter of the patent in suit but is one of importance to all patentees whose inventions are capable of being employed by itinerants, and is submitted as worthy of final determination by this Court.

Respectfully submitted,

THEODORE H. LASSAGNE,
JAMES M. NAYLOR,
Counsel for Petitioners.



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v.

GEORGE WALTER BAKER AND MODERN PRECOOLING COMPANY, a partnership,
Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

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GEORGE WALTER BAKER AND MODERN PRECOOLING COMPANY, a partnership,
Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

SUMMARY STATEMENT OF THE CASE

The summary statement of the case by petitioners, at page 5 of their brief, should be amplified by pointing out that the agreed statement of facts to be found on page 6 of the record discloses that respondents

maintain an office at Plant City, Florida, which is their sole and only office; that they also maintain a post office box in the United States Post Office at Plant City, Florida, and that they maintain no other office or offices; and that all of their letterheads contain the above Post Office address and Post Office box, as do all their business cards, and that the only way a shipper can contact the respondents when such shipper is not in direct personal touch with them is through the Plant City, Florida, office, and that all of the customers of respondents do have direct relations with such Plant City, Florida, office.

It is also shown by the agreed statement of facts that the respondents carried on in the District of Florida the same acts charged by petitioners to be an infringement of the patents in suit.

ARGUMENT

SUMMARY OF THE ARGUMENT

Point A: Neither of the reasons relied upon for allowance of the writ is of that special and important character set forth in Supreme Court Rule 38.5 (b) sufficient to warrant the granting of the writ.

Point B: The Circuit Court of Appeals interpreted Rule 12 of the Federal Rules of Civil Procedure according to the plain import and reading thereof.

Point C: The Circuit Court of Appeals decided the question of venue according to the controlling

weight of authority, and its decision is not in conflict with any other decision of any other Circuit, nor with any applicable decision of this Court.

POINT A

Neither of the reasons relied upon by petitioners in support of their petition is sufficient to warrant this Court in granting the writ, as neither of them fall within the category of reasons enumerated in subdivision 5 (b) of Supreme Court Rule 38 or any reasonable extension thereof.

Interpretation of Federal Rules of Civil Procedure, Rule 12.

Petitioners have not shown that the interpretation of Rule 12 of the Rules of Federal Procedure is in conflict with the plain language and import of that rule, or in conflict with any other decision interpreting the rule.

Interpretation of United States Code, Title 28 Sec. 109.

In deciding the question of venue, the Court merely followed the doctrine of the accepted weight of authority as discussed in its opinion, and the petitioners have not shown that its decision in that regard is in conflict with the decision of any other Circuit Court of Appeals, or in any way in conflict with any applicable decision of this Court.

Furthermore, the decision of the question of fact involved in the instant case on the question of venue does not present a sufficiently important question as to engross the attention of this Court, or to call for an exercise of the discretion of this Court.

POINT B

The Circuit Court of Appeals interpreted Equity Rule 12 according to the plain import of the language of the rule.

Subdivision (b) of Rule 12 gives to a defendant the option of raising the defense of improper venue either by motion, *or* in the answer. Subdivision (e) grants to the defendant the right to obtain by motion a more definite statement of the charge in the complaint in order "to enable him to prepare his responsive pleading or to prepare for trial". Subdivision (g) of the rule makes provision for the joining of all available motions permitted by Rule 12, and for the obvious purpose of avoiding forced delays prohibits bringing by separate motion any of the omitted defenses which were theretofore available; but this subdivision does not forbid one to raise in his answer any of the omitted defenses. Subdivision (h) provides that any defense not raised either by motion *or* in the answer, shall be deemed to be waived.

Obviously, therefore, all that Rule 12 (h) provides is that any defense optionally permitted to be made by motion, and which is not raised *either* by *a motion or* by *answer,* will be deemed to have been waived.

However, in the instant case, *no* defense was raised by motion. The respondents merely availed themselves of the provisions of Subdivision (e) of Rule 12 to obtain a bill of particulars from which to ascertain the nature of the charge of infringement made against them before formulating their answer.

Having thus ascertained the character of the charge, respondents then prepared and filed their answer and elected to therein plead the defense of improper venue.

Petitioners say that because of this, and because respondents did not raise such defense by motion at the time they took the wholly preliminary step of moving for the bill of particulars, that they waived their privilege of such defense under the provisions of Rule 12 (h).

Such an interpretation would render nugatory the optional privilege as to the pleading of the defense, and particularly as in the instant case, it would render nugatory respondents' right to defer answer containing such defense until they had first determined the nature of the charge in the bill of complaint as provided for in Rule 12 (e).

POINT C

The Circuit Court of Appeals decided the question of venue in strict accordance with the weight of authority as cited and discussed in its able and well

considered opinion set forth at pages 20 to 30 of the record, which citations will not be repeated here.

Petitioners have in no way attacked the controlling weight of these authorities or pointed out any reason why the same should not be controlling in the instant case. Petitioners merely argue the broad question of the probable impossibility of securing jurisdiction over a wholly transient defendant, and ask this Court to assume the burden of using this action as the vehicle in which to decide this wholly abstract question, but which is not in point here.

In the instant case, the petitioners have available a District—that is, the Judicial District of Florida—where it could have secured complete jurisdiction over respondents, and long before this would undoubtedly have been able to secure an adjudication of this case on its merits, had they seen fit to proceed in the usual correct and orderly manner provided for in the statute.

CONCLUSION

The well considered decision of the Circuit Court of Appeals for the Ninth Circuit is manifestly correct. It is in accord with the applicable decisions of this Court, and is not in conflict with the decisions of any other Circuit Court of Appeals. The adjudication on the question of venue involves merely the application of well settled rules of law to facts peculiar to this case. It presents no question of general importance or any other of the usual or recognized grounds

for certiorari. Consequently, the petition presents no matter worthy of review in this Court, and should be denied.

Dated: Stockton, California, November 5, 1941.

Respectfully submitted,

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Counsel for Respondent.

WEBSTER & WEBSTER,
Of Counsel.